

# CITY COUNCIL AGENDA ITEM COVER MEMO

Agenda Item Number \_\_\_\_\_

Meeting Type: Regular

Meeting Date: 4/12/2012

Action Requested By:  
Engineering

Agenda Item Type  
Resolution

Subject Matter:

Agreement with Big Cove Properties North 4, L.L.C.

Exact Wording for the Agenda:

Resolution authorizing the Mayor to enter into an agreement with Big Cove Properties North 4, L.L.C. for Stormwater Detention Facility Maintenance

**Note: If amendment, please state title and number of the original**

Item to be considered for: Action

Unanimous Consent Required: No

Briefly state why the action is required; why it is recommended; what Council action will provide, allow and accomplish and; any other information that might be helpful.

Stormwater Detention Facility Maintenance Agreement between Big Cove North 4, L.L.C. and the City requiring Management Enterprise Development & Services, Inc. to maintain the stormwater detention/retention facility at Mountain Cove Fifth Addition. Agreement is at no cost to the City.

Associated Cost:

Budgeted Item: Select...

MAYOR RECOMMENDS OR CONCURS: Select...

Department Head: 

Date: 3/20/12

revised 3/12/2012

VP  
pink  
DB

# ROUTING SLIP

## CONTRACTS AND AGREEMENTS

Originating Department: **Engineering**

Council Meeting Date: **4/12/2012**

Department Contact: **Lynn Majors**

Phone # **256-427-5201**

Contract or Agreement: **Maintenance Agreement**

Document Name: **Big Cove Properties North 4-Mountain Cove Maint Agmt**

City Obligation Amount: **0**

Total Project Budget: **0**

Uncommitted Account Balance: **0**

Account Number: **N/A**

### Procurement Agreements



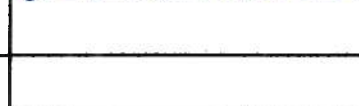
**Not Applicable**

**Not Applicable**

### Grant-Funded Agreements

**Not**  
**Applicable**

**Grant Name:**

Department	Signature	Date
1) Originating		3/28/12
2) Legal		3/28/12
3) Finance		3/30/12
4) Originating		
5) Copy Distribution		
a. Mayor's office (1 copies)		
b. Clerk-Treasurer (Original & 2 copies)		

**RESOLUTION NO. 12-**

**BE IT RESOLVED** by the City Council of the City of Huntsville, Alabama, that the Mayor be, and is hereby authorized, to enter into an agreement with Big Cove Properties North, L.L.C. for Stormwater Detention Facility Maintenance, in Huntsville, Alabama, on behalf of the City of Huntsville, a municipal corporation in the State of Alabama, which said contract is substantially in words and figures similar to that document attached hereto and identified as "Stormwater Detention Facility Maintenance Agreement between Big Cove Properties North 4, L.L.C. and the City of Huntsville, Alabama" consisting of a total of five (5) pages plus one (1) additional page including Exhibit "A", and the date of April 12, 2012 appearing on the margin of the first page, together with the signature of the President or President Pro Tem of the City Council, and an executed copy of said document being permanently kept on file in the Office of the City Clerk of the City of Huntsville, Alabama.

**ADOPTED** this the 12th day of April, 2012.

\_\_\_\_\_  
President of the City Council of  
the City of Huntsville, Alabama

**APPROVED** this the 12th day of April, 2012.

\_\_\_\_\_  
Mayor of the City of Huntsville,  
Alabama

**Detention Facilities Maintenance Agreement  
between Big Cove Properties North 4, L.L.C. and  
the City of Huntsville, Alabama**

**DETENTION FACILITIES  
MAINTENANCE AGREEMENT**

This Detention Facilities Maintenance Agreement ("Agreement"), made and entered into as of 12th day of April, 2012 by and between BIG COVE PROPERTIES NORTH 4, L.L.C., an Alabama limited liability company, ("BCPN4") and CITY OF HUNTSVILLE, a municipal corporation with the State of Alabama, (the "City").

**WITNESSETH:**

WHEREAS, BCPN4 is the present owner of that certain tract of land in Huntsville, Madison County, Alabama, more particularly described as Lot 4 in the Final Plat of Mountain Cove Fifth Addition (a Resubdivision of Lot 2 and Lot 4 of Mountain Cove Fourth Addition recorded as Document Number 20091028000679260) in the Office of the Judge of Probate of Madison County, Alabama) ("Mountain Cove Fifth Addition") ("Lot 4"); and

WHEREAS, BCPN4's predecessors in title have constructed upon that portion of Lot 4 described in Exhibit "A" attached hereto and, by this reference, incorporated herein and made a part hereof ("Detention/Retention Area") certain stormwater detention and retention facilities including, but not limited to, swales, berms, pipes, and related appurtenances (collectively the "Detention Facilities"), to serve all the lands embraced by Mountain Cove Subdivision evidenced by (a) the final plat of Mountain Cove Subdivision recorded as Document Number 20051221000855490, (b) the final plat of Mountain Cove Subdivision Second Addition (a Resubdivision of Lot 2 of Mountain Cove Subdivision) recorded as Document Number 20070910000645000, (c) the final plat of Mountain Cove Subdivision Third Addition (a Resubdivision of Lots 2A & 2B of Mountain Cove Second Addition and a Resubdivision of Lot 3 and Common Area of Mountain Cove Subdivision) recorded as Document Number 20080604000362150, and (d) the final plat of Mountain Cove Subdivision Fourth Addition (a Resubdivision of (1) Mountain Cove Third Addition [a Resubdivision of Lots 2A & 2B of Mountain Cove Second Addition and a Resubdivision of Lot 3 and Common Area of Mountain Cove recorded as Document Number 20080604000362150]; (2) Mountain Cove Second Addition [a Resubdivision of Lot 2 of Mountain Cove recorded as Document Number 20070910000645000]; and (3) Mountain Cove Subdivision recorded as Document Number 20051221000855490], all in the Office of the Judge of Probate of Madison County, Alabama.), and recorded as Document Number 20091028000679260, all in the Office of the Judge of Probate of Madison County, Alabama, as has been, or as may hereafter be, amended, subdivided and/or resubdivided ("Mountain Cove"); and

WHEREAS, City has requested that BCPN4 enter into this Agreement to provide for the maintenance of the Detention Facilities within the Detention/Retention Area.

NOW, THEREFORE, for and in consideration of the sum of Ten and No/100 Dollars (\$10.00), and other good and valuable consideration, this day in hand paid by BCPN4 to City, the receipt, adequacy and sufficiency of all of which are hereby expressly acknowledged, BCPN4 and City, for themselves and for their respective successors and assigns, do hereby agree and covenant as follows:

1. **Maintenance and Detention Facilities.** BCPN4 and each future owner of Lot 4 shall, during their respective time of ownership of Lot 4, shall maintain the Detention Facilities within the Detention/Retention Area in good working order acceptable to City Engineering Department.

\_\_\_\_\_  
President of the City Council of  
the City of Huntsville, Alabama  
Date: April 12, 2012

It is BCPN4's and City's express agreement, intention and understanding that BCPN4 and each future owner of Lot 4 shall be responsible for so maintaining the Detention Facilities within the Detention/Retention Area only during the period of time such entity or person shall own Lot 4, and not thereafter. As used herein, the term "Responsible Party" shall mean either BCPN4 or each such future owner of Lot 4 only during the period of time he, she or it shall own Lot 4 and not thereafter.

Upon a Responsible Party's failure to perform such maintenance obligations, City shall have the right but not the obligation to perform the same pursuant to the easement granted in Section 2 below and shall have the right to receive reimbursement from such Responsible Party for the costs of such maintenance as set forth in Section 3 below.

2. Grant of Easement. BCPN4 does hereby grant, bargain, sell and convey unto City, its successors and assigns, a permanent and perpetual, non-exclusive easement in and to the Detention/Retention Area to permit City to perform inspection of the Detention Facilities whenever deemed necessary and to perform maintenance of the Detention Facilities if at any time a Responsible Party, after notice and opportunity to cure if notice and opportunity to cure are required as set forth in Section 5 hereof, fails to maintain the Detention Facilities in accordance with Section 1 hereof; provided, however, that in the exercise of such easement rights, City shall use its best efforts to minimize any disruption to such Responsible Party's commercial improvements and related appurtenances (the "Commercial Improvements") and the use thereof.

3. Maintenance Costs. In the event a Responsible Party, after notice and opportunity to cure if notice and opportunity to cure are required as set forth in Section 5 hereof, fails to perform its maintenance obligations pursuant to Section 1 hereof and City performs such maintenance of the Detention Facilities after such failure, such Responsible Party agrees to promptly reimburse City for all reasonable costs incurred by City in maintaining the Detention Facilities.

4. Indemnity/Liability. By virtue of owning Lot 4, each Responsible Party shall, and does hereby, indemnify and hold harmless City, its successors and assigns, and their respective present and future officials, officers, boards, commissions, employees, agents, attorneys, contractors, and subcontractors from and against any and all claims, actions, judgments, damages, fines, costs, liabilities, interest or losses (including reasonable attorneys' fees and expenses and court costs and fees), together with all costs and expenses of any kind or nature, which arise directly or indirectly from such Responsible Party's intentional or negligent acts, either sole or concurrent, with respect to the use or maintenance of the Detention Facilities and any other obligations imposed upon such Responsible Party under the terms of this Agreement (including the intentional or negligent acts, either sole or concurrent, of such Responsible Party's employees, agents, contractors, subcontractors, tenants, subtenants, invitees, licensees, transferees, successors and assigns).

In no event shall City, its successors and assigns, and their respective present and future officials, officers, boards, commissions, employees, agents, attorneys, contractors, and subcontractors (collectively referred to hereafter for purposes of this paragraph as "City") be liable to a Responsible Party, its employees, agents, contractors, subcontractors, tenants, subtenants, invitees, licensees, transferees, successors and assigns for any act or omission of City in the event City performs the maintenance obligations imposed on such Responsible Party under the terms of this Agreement, and such Responsible Party shall indemnify and hold harmless City for same in accordance with the provisions of this Paragraph 4.

Nothing contained in this Paragraph 4 shall be construed as a waiver of any immunity of statutory protection of City and no third party may expand any recovery against City due to a Responsible Party's duty of indemnification.

5. Notice and Cure. Notwithstanding anything to the contrary contained herein, City shall not exercise any of its rights pursuant to Section 2 or Section 3 above until City has provided written notice of a Responsible Party's failure to perform its obligations hereunder as set forth herein and such Responsible Party has had thirty (30) days in which to cure such failure; provided, however, in the event there is an immediate threat to the health or safety of the public or to public property, then City shall not be required to give such Responsible Party notice or an

opportunity to cure. All notices and communications required, necessary or desired to be given to BCPN4 pursuant to this Agreement, including a change of address for purposes of such notices and communications, shall be in writing and shall be given by personal delivery, overnight commercial courier, facsimile transmission or by United States mail, certified, return receipt requested, postage prepaid and addressed as follows:

OWNER:	Big Cove Properties North 4, L.L.C. 231 East Side Square Huntsville, Alabama 35801
TELEPHONE:	256-534-0931
FAX :	256-536-8865

or to the then-current Responsible Party according to the records on file in the Office of the Tax Assessor of Madison County, Alabama.

6. Representations. Each party represents and warrants that it has the full right, power and authority to enter into, execute and deliver this Agreement and to convey the aforesaid easements and related rights and to be bound hereby and hereto.

7. Estoppel Certificate. City agrees that it will, within sixty (60) days of receipt of written request by a Responsible Party, execute and deliver any estoppel certificate reasonably requested by such Responsible Party for the benefit of such Responsible Party's mortgagee or prospective assigns, certifying that, to the best of City's knowledge, information and belief, no amounts are due and owing under this Agreement and such Responsible Party is in compliance with all of its obligations hereunder. Such written request shall be sent by personal delivery, overnight commercial carrier, or by U.S. Mail, certified, return receipt requested, postage prepaid and addressed as follows:

City Engineer  
City of Huntsville  
320 Fountain Circle  
Huntsville, Alabama 35801

With a copy to:

City Attorney  
City of Huntsville  
308 Fountain Circle  
Huntsville, Alabama 35801

8. Non-Waiver. Failure of City to insist on strict performance of any of the conditions, covenants, terms, or provisions of this Agreement or to exercise any of its rights hereunder shall not waive such rights, but City shall have the right to enforce such rights at any time and take such action as might be lawful or authorized hereunder, either in law or equity.

9. Successors and Assigns. This Agreement, and the duties, liabilities, obligations and responsibilities set forth herein, are covenants running with the land/Lot 4, and shall be binding upon, and shall inure to the benefit of, Lot 4, BCPN4, each Responsible Party, City, and their respective heirs, personal representatives, successors and assigns, and shall pass with the conveyance of all or any portion of Lot 4, whether specifically referred to or not.

10. Choice of Law. Any and all disputes arising out of this Agreement shall be governed, construed and enforced in accordance with the laws of the State of Alabama. All actions related to the validity, construction, interpretation and enforcement of this Agreement shall be instituted and litigated in the courts of Alabama. BCPN4 submits, and each Responsible Party shall submit, to the jurisdiction of the courts of Alabama located in Madison County, Alabama.



11. Entire Agreement. This Agreement contains the sole and entire agreement of the parties with respect to matters contemplated hereunder, and no representations, inducement, promise or agreement, oral or written, between BCPN4 and City and not incorporated herein shall be of any force or effect. Any amendment to this Agreement shall be in writing and executed by BCPN4 or the appropriate Responsible Party, and City.

12. Running With Land. The easement contained herein shall run with the land as a burden to Lot 4, and shall pass with the conveyance of all or any portion of Lot 4, whether specifically referred to or not.

13. Severability. If any term of this Agreement is found to be void or invalid, such invalidity shall not affect the remaining terms of this Agreement.

14. Cancellation of Prior Agreement. The Detention Facilities Maintenance Agreement by and between Big Cove Properties North, L.L.C., an Alabama limited liability company, as Owner, and City of Huntsville, a municipal corporation within the State of Alabama, as City, dated as of May 27, 2008, filed for record July 1, 2008 and recorded as Document Number 20080701000427730 in the Office of the Judge of Probate of Madison County, Alabama, is hereby cancelled and terminated, and rendered null and void and of no further force and effect, and is unenforceable; provided, however, notwithstanding the foregoing, in the event this Agreement is not recorded in the Office of the Judge of Probate of Madison County, Alabama, or, after such recordation, this Agreement is vacated, then, the aforementioned Detention Facilities Maintenance Agreement shall be automatically reinstated without further action or approval and thereafter shall be in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed under seal and delivered as of the date first above written.

OWNER:

BIG COVE PROPERTIES NORTH 4, L.L.C.,  
an Alabama limited liability company

By: Jobala, LLC,  
an Alabama limited liability company,  
As its Manager

By: John R. Wynn  
John R. Wynn,  
As a Manager

STATE OF ALABAMA     )  
                                      )  
COUNTY OF MADISON    )

I, Donna C. Gilley, a Notary Public in and for said County in said State, hereby certify that John R. Wynn, whose name as a Manager of Jobala, LLC, an Alabama limited liability company, acting in its capacity as Manager of Big Cove Properties North 4, L.L.C., an Alabama limited liability company, is signed to the foregoing Detention Facilities Maintenance Agreement, and who is known to me, acknowledged before me on this day, that being informed of the contents of the foregoing Detention Facilities Maintenance Agreement, he, as such Manager and with full authority, executed the same voluntarily for and as the act of the said Jobala, LLC, an Alabama limited liability company, acting in its capacity as Manager of Big Cove Properties North 4, L.L.C., an Alabama limited liability company, as of the day the same bears date.

GIVEN UNDER MY HAND and official seal on this the 3rd day of March, 2012.

Donna C. Gilley  
Notary Public  
State of Alabama  
County of Madison

[SEAL]

My Commission Expires:

7-12-2014

Attest: \_\_\_\_\_  
Charles E. Hagood  
as Clerk-Treasurer of  
City of Huntsville,  
a municipal corporation  
within the State of Alabama

[SEAL]

CITY:

CITY OF HUNTSVILLE,  
a municipal corporation  
within the  
State of Alabama

By: \_\_\_\_\_  
Tommy Battle  
As its Mayor

STATE OF ALABAMA        )  
                                  )  
COUNTY OF MADISON     )

I, \_\_\_\_\_, a Notary Public in and for said County in said State, hereby certify that Tommy Battle and Charles E. Hagood, whose names as Mayor and Clerk-Treasurer, respectively, of the City of Huntsville, a municipal corporation within the State of Alabama, are signed to the foregoing Detention Facilities Maintenance Agreement, and who are known to me, acknowledged before me on this day that, being informed of the contents of the foregoing Detention Facilities Maintenance Agreement, they, as such officers and with full authority, executed the same voluntarily for and as the act of the City of Huntsville, a municipal corporation within the State of Alabama, as of the day the same bears date.

GIVEN under my hand and official seal on this the \_\_\_\_ day of \_\_\_\_\_, A.D., 2012.

My Commission Expires:

\_\_\_\_\_

\_\_\_\_\_  
Notary Public  
State of Alabama  
County of Madison     [SEAL]



EXHIBIT "A"

Reconfigured Detention and Retention Area of Mountain Cove Subdivision

All that part of proposed Lot 4 of Mountain Cove Fifth Addition, a Resubdivision of Lots 2 and 4 of Mountain Cove Fourth Addition as recorded in Document Number 20091028000679260 in the Office of the Judge of Probate of Madison County, Alabama, more particularly described as beginning at the Southeast corner of Lot 3 of said Mountain Cove Fourth Addition; thence from the point of beginning North 01 degrees 21 minutes 55 seconds East, a distance of 198.41 feet to a point; thence North 77 degrees 13 minutes 11 seconds East, a distance of 128.91 feet to a point; thence South 01 degrees 21 minutes 55 seconds West, a distance of 229.92 feet to a point; thence North 88 degrees 38 minutes 05 seconds West, a distance of 125.00 feet to the point of beginning and containing 0.61 acres, more or less.